

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>OLIVIA DIXON,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>BOSCOV'S, INC. f/k/a</b> Boscov's	:	
Department Store, Inc. and/or Boscov's	:	
Department Store, LLC and/or Port of the	:	
World, Inc. and/or Port of the World LLC,	:	
<b>BOSCOV'S DEPARTMENT STORE,</b>	:	
<b>INC., BOSCOV'S DEPARTMENT STORE,</b>	:	
<b>LLC, PORT OF THE WORLD, INC.,</b>	:	
<b>AND PORT OF THE WORLD LLC,</b>	:	
	:	
<b>Defendants.</b>	:	<b>NO. 02-1222</b>

**Reed, S.J.**

**July 17, 2002**

**MEMORANDUM**

This action arises out of an altercation between plaintiff and a security guard at a store of defendants in the Franklin Mills Mall in Philadelphia, Pennsylvania. Plaintiff asserts federal civil rights claims under 42 U.S.C. §§ 1981, 1985, and 1986, and a claim of intentional infliction of emotional distress under state law. Now before the Court is the motion of defendants Boscov's Inc., Boscov's Department Store, Inc., Boscov's Department Store, LLC, Port of the World, Inc., Port of the World LLC (collectively, "Boscov's") to dismiss for failure to state a claim pursuant to Rule 12(b)(6), for a more definite statement pursuant to Rule 12(e), and to strike pursuant to Rule 12(f) of the Federal Rules of Civil Procedure (Document No. 6), and the response of plaintiff Dixon thereto (Document No. 10). For the reasons set forth below, the motion will be granted in part and denied in part.

## **A. Background**<sup>1</sup>

Plaintiff, an African-American woman, and her daughter were waiting in the check-out line of Boscov's, when they were accosted by Terry Steward, an employee of the defendants' store. Steward represented herself as head of store security and accused plaintiff of engaging in illegal or fraudulent acts, including the use of a fraudulent credit card. Specifically, Steward remarked, "I don't know why they [plaintiff and her daughter] are waiting, the sale is not going to go through." Steward then approached plaintiff, stating "They aren't going to give you those items, I put a stop to that." Steward continued, "You're not going to take this out of the store, your card is fraudulent." Steward ordered the cashier to void the sale, took plaintiff's shopping bags and emptied their contents onto the floor. When plaintiff's daughter bent down to pick up the merchandise, Steward ordered, "Get the f\_\_k away from that merchandise." She commented, "I see black people come in here all of the time stealing. All of you are thieves." Another employee of Boscov's approached the companion of plaintiff's daughter and threatened to "f\_\_k [him] up." When plaintiff left the store, Steward followed her into the parking lot and stated, "If you don't get out of her [sic] right now, there's a cop waiting in the alley for you." Steward produced a cellular phone and stated that she was calling the police. The instant suit ensued.

## **B. Legal Standard**

Rule 12(b) of the Federal Rules of Civil Procedure provides that "the following defenses may at the option of the pleader be made by motion: ... (6) failure to state a claim upon which relief can be granted." In deciding a motion to dismiss under Rule 12(b)(6), a court must take all well-pleaded facts in the complaint as true and view them in the light most favorable to the

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<sup>1</sup> All facts are taken as true from the amended complaint, as required by law.

plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S.Ct. 1843 (1969). Because the Federal Rules of Civil Procedure require only notice pleading, the complaint need only contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a). A motion to dismiss should be granted only if “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229 (1984).

## C. Analysis

### 1. Sections 1985 and 1986

Section 1985 of the federal civil rights provisions prohibits conspiracies to deprive a U.S. citizen of his constitutional rights based on invidious class-based discrimination. See 42 U.S.C. § 1985. <sup>2</sup> To state a claim under section 1985 for private conspiracy, a plaintiff must allege:

- (a) that a racial or other class-based invidious discriminatory animus lay behind the coconspirators’ actions, (b) that the coconspirators intended to deprive the victim of a right guaranteed by the Constitution against private impairment, and (c) that that right was consciously targeted and not just incidentally affected.

Brown v. Philip Morris, Inc., 250 F.3d 789, 805 (3d Cir. 2001) (citing Spencer v. Casavilla, 44 F.3d 74, 77 (2d Cir. 1994); citing also Tilton v. Richardson, 6 F.3d 683, 686 (10<sup>th</sup> Cir. 1993)).

While Section 1985(3) provides a remedy for purely private conspiracies involving no state

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<sup>2</sup>Section 1985(3) provides, in relevant part:  
If two or more persons in any State or Territory conspire...for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws;...[and] in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for recovery of the damages, occasioned by such injury or deprivation against anyone or more of the conspirators.  
42 U.S.C. § 1985(3).

action, see Griffin v. Breckenridge, 403 U.S. 88, 100, 29 L.Ed. 2d 338, 91 S.Ct. 1790 (1971), it does so only when the rights aimed at by the conspiracy are protected against private encroachment. See United Bhd. of Carpenters & Joiners, Local 610 v. Scott, 463 U.S. 825, 833, 77 L.Ed. 2d 1049, 103 S.Ct. 3352 (1983). Only two rights have hitherto been recognized by the Supreme Court as protected against private conspirators under section 1985(3): the right to be free from involuntary servitude and the right to interstate travel. See Brown, 250 F.3d at 805 (citing Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 278, 113 S.Ct. 753, 122 L.Ed. 2d 34 (1993)). In Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 378, 60 L.Ed. 2d 957, 99 S.Ct. 2345 (1979), the Supreme Court held that rights pursuant to Title VII could not be the basis for a section 1985(3) claim. In their concurring opinions, Justices Stevens and Powell extended this holding to state that section 1985 was intended to provide a remedy only for the violation of rights protected by the Constitution and not for the violation of statutory rights. See Novotny, 442 U.S. at 379-85.

Plaintiff contends that her allegation of a section 1981 violation supports her claim under section 1985(3).<sup>3</sup> There is conflicting authority among the district courts on whether section 1981 may be the basis of a section 1985 claim. See, e.g., Weeks v. Coury, 951 F.Supp. 1264, 1277 (S.D. Tex. 1996) ("The courts have recognized that Section 1985(3) claims may be supported by rights created under Section 1981") (citing Vakhariav. Swedish Covenant Hosp., 824 F.Supp. 769 (N.D. Ill. 1993); Alderv. Columbia Historical Society, 690 F.Supp. 9 (D.D.C. 1988)). Nevertheless, although stated in dictum, the Third Circuit Court of Appeals in Brown

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<sup>3</sup>Plaintiff correctly notes that defendants have failed to move to dismiss her section 1981 claim. Defendants have not filed a reply brief nor moved to add the section 1981 claim to their motion for dismissal.

rejected the same argument posed by plaintiff. <sup>4</sup>Without expressly adopting the concurring positions of Justices Stevens and Powell in Novotny, the Brown court set forth a legal standard which required the rights protected by section 1985 to be guaranteed by the Constitution. See Brown, 250 F.3d at 804. Accordingly, the Brown court observed that statutory rights pursuant to section 1981 cannot be the basis of a section 1985 remedy. Id. at 805. The court further stated:

[Plaintiffs] Black Smokers attempt to salvage their § 1985(3) claims by arguing that defendants' alleged violation of §§ 1981 and 1982 may support a claim under § 1985(3). In light of the overwhelming preponderance of authority on the question, this argument too must fail. Contrary to Black Smokers' claims, [the Supreme Court opinion in] Bray[, 506 U.S. at 278,] does not support the proposition that §§ 1981 or 1982 claims can form the basis of a § 1985(3) claim or the notion that the contract and property rights protected by §§ 1981 and 1982 fall within the category of "involuntary servitude" violation that may support a § 1985(3) claim.

Id. at 805-06 (internal citations and footnote omitted). Thus, the strong language used indicates how the Third Circuit Court of Appeals would resolve this issue. Because plaintiff has failed to allege that defendants conspired to violate her fundamental rights protected by the Constitution against private encroachment, her section 1985(3) claim cannot stand.

Section 1986 constitutes an additional safeguard against the wrongs prohibited by section 1985.<sup>5</sup> Clark v. Clabaugh, 20 F.3d 1290, 1295 (3d Cir. 1994). It provides a cause of action for

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<sup>4</sup>The Brown court ultimately reserved the issue, noting that it "need not[] resolve the question whether violation of §§ 1981 and 1982 can support a § 1985(3) claim because [plaintiffs] have failed to state a claim under either § 1981 or § 1982." Brown, 250 F.3d at 806. Nevertheless, the direction provided by the dictum is persuasive. See Harden v. RR Donnelly, C.A. No. 01-6147, 2002 U.S. Dist. LEXIS 12124, at \*\*4-5 (E.D. Pa. April 1, 2002) (denying motion for reconsideration on section 1985 claim based on Brown dictum).

<sup>5</sup>Section 1986 provides, in relevant part:  
Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented....  
42 U.S.C. § 1986.

recovery against anyone who with knowledge of a section 1985 conspiracy and the power to prevent its violation, neglects or refuses to do so. To state a claim under section 1986, plaintiffs must show the existence of a section 1985 conspiracy. Id. As discussed above, plaintiff has failed to state a cause of action under section 1985; consequently, her section 1986 claim is untenable.

It therefore concludes that the claims under sections 1985 and 1986 will be dismissed.

## ***2. Intentional Infliction of Emotional Distress***

The tort of intentional infliction of emotional distress is defined under Pennsylvania law as “[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.” Shaner v. Synthes, 204 F.3d 494, 507 (3d Cir. 2000) (quoting Hoy v. Angelone, 554 Pa. 134, 150, 720 A.2d 745, 753 (1998) (quoting Restatement (Second) of Torts § 46)). “ “[C]ourts have been chary to allow recovery for a claim of intentional infliction of emotional distress. Only if conduct which is extreme or clearly outrageous is established will a claim be proven.” Id. (quoting Hoy, 720 A.2d at 753-54). In addition, the complaint must allege physical injury in order to support a claim for intentional infliction of emotional distress. See Atkinson v. City of Philadelphia, C.A. No. 99-1541, 2000 U.S. Dist. LEXIS 8500, at \*\*19-21 (E.D. Pa. June 20, 2000); Corbett v. Morgenstern, 934 F. Supp. 680, 684 (E.D. Pa. 1996) (citing Roll v. Westmoreland Health Sys., 438 Pa. Super. 33, 38, 651 A.2d 160, 164 (1994); Armstrong v. Paoli Memorial Hosp., 430 Pa. Super. 36, 43, 633

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<sup>6</sup>The Court of Appeals for the Third Circuit has noted that the Pennsylvania Supreme Court has not explicitly adopted the Restatement; however, the court assumed the existence of the tort and appeared to have relied on the Restatement. See Shaner, 204 F.3d at 508 n. 18 (citing Hoy, 720 A.2d at 753 n. 10).

A.2d605,608(1993); Abadie v. Riddle Memorial Hosp., 404 Pa. Super. 8, 13, 589 A.2d 1143, 1146 (1991)). The complaint there fails to allege any physical injury suffered by plaintiff. Therefore, I conclude that plaintiff has failed to state a claim for intentional infliction of emotional distress.

### **3. *Defunct Corporate Defendants***

Defendant has moved to dismiss the claims against the corporate defendants that are now defunct. Plaintiff has expressly stated that she has no objection to this dismissal. Therefore, the motion of defendant to dismiss the claims against all defendants other than those against defendant Boscov's Department Stores, LLC will be granted.

### **4. *Paragraphs 20, 21 and 23 of the Complaint***

Defendant has moved to strike paragraphs 20, 21 and 23 from the complaint as immaterial, impertinent and scandalous material. Rule 12(f) permits a court to "order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." FED. R. CIV. P. 12(f). "While courts possess considerable discretion in weighing Rule 12(f) motions, such motions are not favored and will be generally denied unless the material bears no possible relation to the matter at issue and may result in prejudice to the moving party." Miller v. Group Voyagers, Inc., 912 F. Supp. 164, 168 (E.D. Pa. 1996) (citing North Penn Transp. v. Victaulic Co. of Am., 859 F. Supp. 154, 158 (E.D. Pa. 1994); Great W. Life Assurance Co. v. Levithan, 834 F. Supp. 858, 864 (E.D. Pa. 1993)); see also CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1380 at 647 (2d ed. 1995). Paragraphs 20, 21 and 23 describe the actions of Steward towards plaintiff's daughter and the threat of an unidentified security guard towards the companion of plaintiff's

daughter. Defendants have demonstrated no prejudice that would result should the allegations remain. Accordingly, the motion to strike paragraphs 20, 21, and 23 will be denied.

#### **5. *Injunctive Relief, Medical Expenses, Lost Wages***

Defendant has further moved to strike plaintiff's request for injunctive relief, medical expenses, and lost wages as unavailable under the asserted causes of action and facts alleged. Plaintiff has failed to address this request in her response. Equitable relief is not available when a plaintiff has an adequate remedy at law. Barnes v. Am. Tobacco Co., 989 F. Supp. 661, 667 (E.D. Pa. 1997); Do v. Provident Life & Accident Ins. Co., 936 F. Supp. 302, 305 (E.D. Pa. 1996). Plaintiff has not alleged any facts that would warrant the grant of injunctive relief, nor has she alleged that she has either incurred medical expenses or lost any wages as a result of the alleged incident. Accordingly, defendant's motion to strike the requested injunctive relief, medical damages and lost wages will be granted.

#### **6. *Amended Complaint***

Defendants have requested that plaintiff file an amended complaint pursuant to Federal Rule of Civil Procedure 12(e) repleading all averments concerning damages. "If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading." F. R. CIV. P. 12(e). "The class of pleadings that are appropriate subjects for a motion under Rule 12(e) is quite small—the pleading must be sufficiently intelligible for the court to be able to make out one or more potentially viable legal theories on which the claimant might proceed." Sun Co. v. Badger Design & Constructors, 939 F. Supp. 365, 368 (E.D. Pa. 1996) (citing 5A HARLES A. WRIGHT & ARTHUR R. MILLER,



FEDERAL PRACTICE AND PROCEDURE § 1376 (1990)). Granting the motion is appropriate only when the pleading is “so vague or ambiguous that the opposing party cannot respond, even with a simple denial, in good faith, without prejudice to itself.” Id. (citation and internal brackets omitted). If find that even with the requested remedies of injunctive relief, medical expenses and lost wages stricken from the complaint, the pleading is not so vague or ambiguous that defendants could not respond. Accordingly, the request for an amended complaint is denied.

#### **D. Conclusion**

For the foregoing reasons, I conclude that plaintiff has failed to state a claim for relief under sections 1985(3) and 1986 and under Pennsylvania law for intentional infliction of emotional distress. Consequently, paragraphs 29 and 30 of Count I and all of Count II of the complaint will be dismissed. Further, all claims against the defendants other than those against Boscov’s Department Stores, LLC, will be dismissed, as will plaintiff’s request for injunctive relief, medical expenses and lost wages. The motion of defendants to strike paragraphs 20, 21 and 23 from the complaint and for an amended complaint will both be denied.

An appropriate Order follows.

**INTHEUNITEDSTATESDISTRICTCOURT  
FORTHEEASTERNDISTRICTOFPENNSYLVANIA**

<b>OLIVIA DIXON,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>BOSCOV'S, INC. f/k/a</b> Boscov's	:	
Department Store, Inc. and/or Boscov's	:	
Department Store, LLC and/or Portsofthe	:	
World, Inc. and/or Portsofthe World LLC,	:	
<b>BOSCOV'S DEPARTMENT STORE,</b>	:	
<b>INC., BOSCOV'S DEPARTMENT STORE,</b>	:	
<b>LLC, PORTSOFTHE WORLD, INC.,</b>	:	
<b>AND PORTSOFTHE WORLD LLC,</b>	:	
	:	
<b>Defendants.</b>	:	<b>NO. 02-1222</b>

**ORDER**

**AND NOW**, this 17th day of July, 2002, upon consideration of the motion of defendants Boscov's Inc., Boscov's Department Store, Inc., Boscov's Department Store, LLC, Portsofthe World, Inc., Portsofthe World LLC to dismiss for failure to state a claim pursuant to Rule 12(b) (6), for a more definite statement pursuant to Rule 12(e), and to strike pursuant to Rule 12(f) of the Federal Rules of Civil Procedure (Document No. 6), and the response of plaintiff Olivia Dixon thereto (Document No. 10), and for the reasons set forth in the foregoing memorandum, **IT IS HEREBY ORDERED** that the motion of defendants to dismiss plaintiff's claims under 42 U.S.C. §§ 1985 and 1986 and under Pennsylvania law for intentional infliction of emotional distress is **GRANTED**; to dismiss the claims against all defendants other than defendant Boscov's Department Store, LLC, is **GRANTED**; to strike plaintiff's request for injunctive relief, medical expenses and lost wages is **GRANTED**; to strike paragraphs 20, 21 and 23 from plaintiff's complaint is **DENIED**; and for an amended complaint is **DENIED**. Accordingly,

plaintiff's claims under 42 U.S.C. §§ 1985 and 1986 in paragraphs 29 and 30 of Count I and for intentional infliction of emotional distress in Count II of the complaint are **DISMISSED** as to all defendants and plaintiff's claim under 42 U.S.C. § 1981 in paragraph 31 of Count I of the complaint is **DISMISSED** as to defendants Boscov's Inc., Boscov's Department Store, Inc., Port of the World, Inc., and Port of the World LLC .

**IT IS FURTHER ORDERED** that defendant Boscov's Department Store, LLC, shall answer the remaining allegations of a violation under 42 U.S.C. § 1981 in the complaint no later than August 19, 2002.

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**LOWELLA REED, JR., S.J.**